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No. 614

In the Supreme Court of the United States

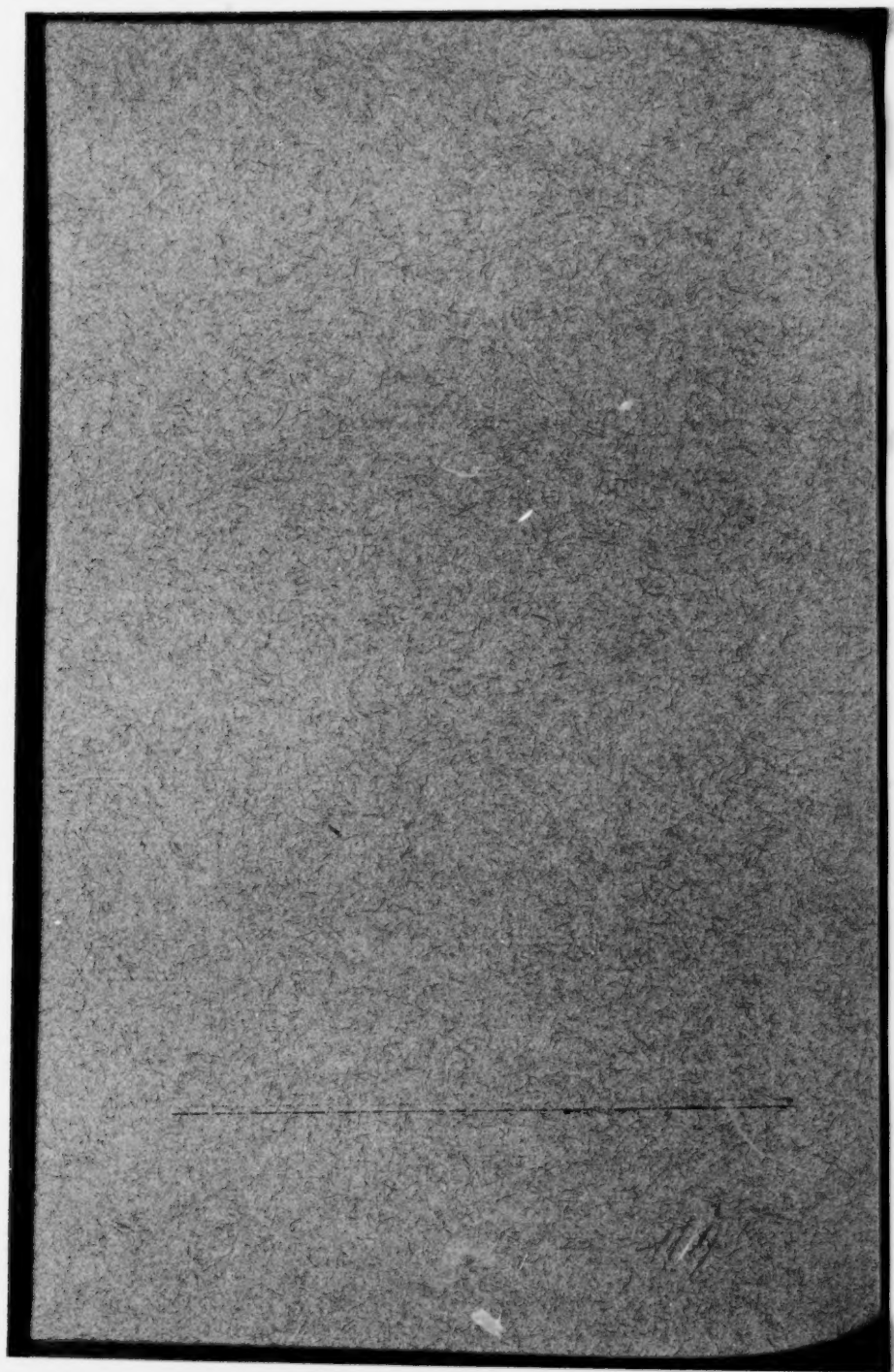
OCTOBER TERM, 1961

COLUMBIA CIGARETTE CO., CANTERBURY CIGARETTE CO.,
MTC. CORP., EAST SMITHFIELD PAPER CO.,
EDELSTEIN DAIRY CO., INC., NEWARK CIGARETTE
CO., INC., RICHMOND DAIRY CO., INC., SMOCK
CIGARETTE CORPORATION, AND MARYLAND CIGARETTE
PETITIONERS

PAUL V. MCNUTT, AS FEDERAL SECURITIES ADMIN-
ISTRATOR OF THE UNITED STATES

ON PETITION FOR A WRIT OF HABEAS CORPUS IN THE
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT

BRIEF FOR THE RESPONDENT AS APPLICANT



INDEX

	Page
Opinions below.....	1
Jurisdiction.....	1
Questions presented.....	2
Statute involved.....	3
Statement:	
1. History of the proceedings.....	5
2. The Regulations.....	7
3. The evidence adduced at the hearing.....	8
a. Cream cheese is identified by its high-fat, low-moi- sture content.....	8
b. The development of the hot-pack manufacturing process and the use of moisture-retaining gums resulted in a cheese product with less fat and more moisture than cream cheese has traditionally contained.....	11
c. Consumer confusion and prejudice from sale of the low-fat, high-moisture product as "cream cheese".....	16
4. Additional evidence set forth in argument.....	18
Argument.....	18
Conclusion.....	36

CITATIONS

Cases:

<i>Federal Security Adm'r v. Quaker Oats Co.</i> , 318 U. S. 218.....	8, 20, 22, 30, 31
<i>Federal Trade Commission v. Algoma Lumber Co.</i> , 291 U. S. 67.....	22
<i>Hebe Co. v. Shaw</i> , 248 U. S. 297.....	23
<i>Houston v. St. Louis Packing Co.</i> , 249 U. S. 479.....	22, 28
<i>Mugler v. Kansas</i> , 123 U. S. 623.....	23
<i>Pacific States Box & Basket Co. v. White</i> , 296 U. S. 176.....	22
<i>Powell v. Pennsylvania</i> , 127 U. S. 678.....	23
<i>United States v. Carolene Products Co.</i> , 304 U. S. 144.....	23
<i>United States v. Dotterweich</i> , No. 5, this Term.....	8

(1)

II

Statutes and Regulations:

	Page
Butter Standard Act of 1923 (21 U. S. C. 321 (a))-----	20
Federal Food, Drug, and Cosmetic Act of 1938 (52 Stat. 1040; 21 U. S. C. 301 <i>et seq.</i>)-----	
Sec. 301 (a)-----	8
Sec. 303 (a)-----	8
Sec. 304 (a)-----	8
Sec. 401-----	3, 5, 19
Sec. 403 (g)-----	8
Sec. 701 (e)-----	4, 5
Sec. 701 (f) (1)-----	4
Sec. 701 (f) (3)-----	4
McNary-Mapes Amendment to Pure Food and Drugs Act of 1906 (46 Stat. 1019, 21 U. S. C. Sec. 10)-----	10
Meat Inspection Act of June 30, 1906 (34 Stat. 669)-----	28
Pure Food and Drugs Act of 1906 (34 Stat. 768)-----	10
Federal Security Regulations:	
19, 515-----	2, 3, 7
19, 520-----	2, 3, 7
19, 525-----	2, 3, 7, 36
19, 530-----	7
Miscellaneous:	
4 Fed. Reg. 3683 (Aug. 22, 1939)-----	5
6 Fed. Reg. 679-----	5
6 Fed. Reg. 1381-----	5
9 Fed. Reg. 105-----	27
S. Rep. No. 493, 73d Cong., 2d sess. p. 10-----	20
Cavers, <i>The Food, Drug, and Cosmetic Act of 1938: Its Legislative History and Its Substantive Provisions</i> , 6 Law and Contemporary Problems (Duke University) 2, 25-26 (1939)-----	10

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 614

COLUMBIA CHEESE CO., CONESTOGA CREAM & CHEESE
MFG. CORP., EAST SMITHFIELD FARMS, INC.,
EDELSTEIN DAIRY CO., INC., NEWARK CHEESE
CO., INC., ROSEDALE DAIRY CO., INC., SODUS
CREAMERY CORPORATION, AND MEYER ZAUSNER,
PETITIONERS

v.

PAUL V. McNUTT, AS FEDERAL SECURITY ADMIN-
ISTRATOR OF THE UNITED STATES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The majority (R. 1165-1172) and dissenting (R. 1173) opinions in the circuit court of appeals are reported at 137 F. (2d) 576.

JURISDICTION

The judgment of the circuit court of appeals was entered on October 18, 1943 (R. 1180), after

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a petition for rehearing (R. 1174-1178) had been denied on September 25, 1943 (R. 1179). By an order of Mr. Justice Jackson, dated December 17, 1943 (R. 1182), the time for filing a petition for a writ of certiorari was extended to and including January 21, 1944. The petition for a writ of certiorari was filed on January 19, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 701 (f) (4) of the Federal Food, Drug, and Cosmetic Act of June 25, 1938 (52 Stat. 1040, 1055, 21 U. S. C. 371 (f) (4)).

QUESTIONS PRESENTED

The ultimate question is whether Regulations 19.515, 19.520, and 19.525 of the Federal Security Administrator are valid as applied to petitioners. This depends upon whether they are (a) supported by findings based on substantial evidence of record, and (b) within the authority of the Administrator under the Federal Food, Drug, and Cosmetic Act of 1938, with respect separately to the following particulars:

(1) The exclusion by Regulation 19.515, from the cream cheese standard, of those products of petitioners ranging from about 25 percent to 32 percent in milk-fat and up to 65 percent in moisture, which have been sold by them for a number of years by the name "cream cheese."

(2) The failure of Regulation 19.515 to extend the maximum for moisture content in cream cheese from 55 percent to 57 percent so as to allow for a recognized variance of up to 2 percent in the process of manufacture.

(3) The assignment by Regulation 19.520 of the name "neufchatel cheese" to petitioners' low-quality cheese which is excluded from the cream cheese standard.

(4) The failure of Regulations 19.515 and 19.520 to permit the addition of water to the curd in the "hot-pack" process of making cream cheese and neufchatel cheese.

(5) The requirement of Regulation 19.525 that the skim milk used in the manufacture of cottage cheese be pasteurized.

STATUTE INVOLVED

The Federal Food, Drug, and Cosmetic Act of 1938 in pertinent parts (52 Stat. 1040; 21 U. S. C. 301 *et seq.*) provides:

SEC. 401. Whenever in the judgment of the Administrator such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity, a reasonable standard of quality, and/or reasonable standards of fill of container; * * * [21 U. S. C. 341.]

SEC. 701 * * *

(e) The Administrator, on his own initiative or upon an application of any interested industry or substantial portion thereof stating reasonable grounds therefor, shall hold a public hearing upon a proposal to issue, amend, or repeal any regulation contemplated by any of the following sections of the Act: 401 * * *. At the hearing any interested person may be heard in person or by his representative. * * * The Administrator shall base his order only on substantial evidence of record at the hearing and shall set forth as part of the order detailed findings of fact on which the order is based. * * *

(f) (1) In a case of actual controversy as to the validity of any order under subsection (e), any person who will be adversely affected by such order if placed in effect may * * * file a petition with the Circuit Court of Appeals of the United States for the circuit wherein such person resides or has his principal place of business, for a judicial review of such order. * * *

(3) The court shall have jurisdiction to affirm the order, or to set it aside in whole or in part, temporarily or permanently. * * * The findings of the Administrator as to the facts, if supported by substantial evidence, shall be conclusive. [21 U. S. C. 371.]

STATEMENT

1. *History of the proceedings.*—The administrative proceedings leading to the promulgation of the challenged order of the Federal Security Administrator (R. 1148–1165) were commenced in August 1939, by notice of public hearing to be held upon a proposal to establish a definition and standard of identity for cream cheese pursuant to the authority conferred by Sections 401 and 701 (e) of the Federal Food, Drug, and Cosmetic Act of 1938 (*supra*, pp. 3, 4).¹ At the hearing,² some of petitioners appeared and gave testimony, and thereafter filed briefs stating their opposition to the proposal on which the hearing was held. A proposed order, containing findings of fact and a proposed regulation, was issued on September 28, 1940. (R. 1061–1068.) The proposed regulation would have required that cream cheese contain not less than 34 percent of milk-fat and not more than 55 percent of moisture (R. 1067). Petitioners filed exceptions (R. 1069–1075), and upon their application the cream cheese hearing was reopened, after notice (6 Fed. Reg. 1381), and consolidated with a previously announced hearing on proposals for standards for neufchatel, cottage, and creamed cottage cheeses (6 Fed. Reg. 679, 1381). Petitioners participated in the subsequent

¹ 4 Fed. Reg. 3683 (August 22, 1939).

² The hearing was held October 2–6, 1939.

hearing,³ and filed written arguments in favor of a standard allowing lower fat and higher moisture content than the 34 percent fat-55 percent moisture limits which were proposed for cream cheese. On July 17, 1942, the Acting Federal Security Administrator issued a proposed order (R. 1075-1093), setting forth findings of fact and proposed regulations to which petitioners filed exceptions (R. 1093-1124). The final order (R. 1148-1165), substantially identical with the proposed order of July 17, 1942, was promulgated on December 22, 1942, after due consideration and rejection of petitioners' exceptions to the proposed order. The final order establishes, by separate regulations, "definitions and standards of identity"⁴ for cream cheese, neufchatel cheese, cottage cheese, and creamed cottage cheese. It includes 81 specific fact findings, setting forth in detail the basis of the Regulations.

In a statutory review proceeding brought in the United States Circuit Court of Appeals for the Second Circuit, pursuant to Section 701 (f) of the Federal Food, Drug, and Cosmetic Act of 1938 (*supra*, p. 4), all of petitioners' objections to the four regulations promulgated by the Federal Security Administrator's final order were rejected, and all four of the regulations were

³ This hearing was held April 21-May 2, 1941.

⁴ The simpler term "standard" will frequently be used herein in lieu of the statutory phrase "definitions and standards of identity."

affirmed in their application to petitioners (R. 1165-1172, 1180), one judge dissenting in part (R. 1173). In their petition for a writ of certiorari petitioners have abandoned the challenge made in the court below to the creamed cottage cheese standard (Regulation 19.530; R. 1165), so that the issues here are related exclusively to the cream cheese, neufchatel cheese, and cottage cheese standards (Regulations 19.515, 19.520, and 19.525; R. 1162-1165).

2. *The Regulations.*—(a) By Regulation 19.515 (R. 1162-1163) cream cheese is required to contain by weight not less than 33 percent of milk-fat and not over 55 percent of moisture. It must be made from a pasteurized starting mixture of cream with milk or skim milk or both. It may be hotpacked,⁵ "with or without added cream or milk or skim milk or any mixture of two or all of these." Water, not being specified, may not be added. Not to exceed 0.5 percent by weight of one or a mixture of two or more of several designated moisture-retaining gums may be added as optional ingredients, provided their presence is declared on the label.

(b) Regulation 19.520 (R. 1163-1164) prescribes a standard for neufchatel cheese, which must be made in the same manner and from the

⁵ The hot-pack process supplemented the previously established manufacturing process by heating the product and then homogenizing the heated curd (R. 16, 41, 70, 73, 113-114, 285).

same basic ingredients as cream cheese, except that the milk-fat content may vary from 20 to 32 percent inclusive and the moisture content up to a maximum limit of 65 percent.⁶

(c) By regulation 19.525 (R. 1164-1165) cottage cheese is required to contain not more than 80 percent of moisture, and to be made from pasteurized sweet skim milk.

3. *The evidence adduced at the hearing.*—The evidence on which the Regulations were based may be summarized as follows:

a. *Cream cheese is identified by its high-fat, low-moisture content.*—All cream cheeses basically are made by the “neufchatel” process (R. 71, 15-16, 67, 72-73, 110-113, 966-968). Consumers identify these various cheeses by their appearance, body, flavor, odor and texture (R. 76-77, 117, 394, 550, 703-704, 715). The chief factors determining these characteristics are the milk-fat

⁶ Under section 403- (g) (52 Stat. 1047, 21 U. S. C. 343 (g)) a food is misbranded “if it purports to be or is represented as a food for which a definition and standard of identity has been prescribed by regulations as provided by section 401, unless (1) it conforms to such definition and standard, and (2) its label bears the name of the food specified in the definition and standard * * *” (Cf. *Federal Security Adm'r v. Quaker Oats Co.*, 318 U. S. 218). The misbranded product would be subject to seizure and condemnation under section 304 (a) (21 U. S. C. 334 (a)) and any person shipping it in interstate commerce would be subject to criminal penalties under sections 301 (a) and 303 (a) (21 U. S. C. 331 (a) and 333 (a)) (Cf. *United States v. Dotterweich*, No. 5, decided November 22, 1943).

content which is closely related to moisture content (R. 126, 687, 721-723, 831), and variations in manufacturing techniques (R. 52, 230, 240, 721). Cream cheese differs from neufchatel cheese in having a higher milk-fat content, smoother body, creamier taste and finer flavor (R. 110). The characteristic smooth body and texture and the flavor resulting in part from the method of manufacture "but particularly from the characteristically high butter-fat content" (R. 687) are important factors in the identity of cream cheese (R. 117, 199, 231-232, 277, 364, 687).

Traditionally cream cheese was made from cream, characterized in agricultural publications and government bulletins as "rich" or "thick" cream (R. 67-68, 69, 81, 310); cheese made according to the methods described in the literature cited in the record would run in the neighborhood of 40 percent of fat and 50 percent of moisture (R. 73). About the close of the nineteenth century the mechanical separator was introduced and later the use of the Babcock test permitted the standardization of milk and cream on the basis of fat content (R. 312-313). During the period 1912-1920 cream cheese varied from about 32 to 43 percent in fat, with the moisture running from below 40 percent to an exceptional high of about 59 percent (R. 75, 225, 273). In 1921 the Secretary of Agriculture, acting under the

original Pure Food and Drugs Act of 1906 (34 Stat. 768), issued a standard of identity for cream cheese providing that it should contain "in the water-free substance, not less than sixty-five percent (65%) of milk fat" (R. 22). This standard was purely advisory and did not have the force or effect of law.⁷ By relating the milk-fat content to the water-free substance, rather than to the total weight of the product including the moisture content, it theoretically recognized as cream cheese a product containing 90 percent of moisture and 6.5 percent of milk-fat, since in such a case the 6.5 percent milk-fat content would constitute 65 percent of the water-free substance. So long, however, as only the cold-pack process⁸ of manufacture was used, the moisture content

⁷ The predecessor Act of 1906 did not, as does the 1938 Act, authorize the promulgation of legal standards of identity and provide that foods not complying with such standards established for them should be deemed misbranded. So-called standards set up by the Secretary of Agriculture under the 1906 Act were purely administrative, and in a prosecution the defendant was free to urge a different criterion. In 1930 the so-called McNary-Mapes Amendment (46 Stat. 1019, 21 U. S. C. 10) authorized the fixing of legal standards for canned foods, and provided that the failure of a product to comply with such a standard should be shown on the label. For a full discussion, see Cavers, *The Food, Drug, and Cosmetic Act of 1938: Its Legislative History and Its Substantive Provisions*, 6 Law and Contemporary Problems (Duke University) 2, 25-26 (1939).

⁸ "Cold-pack" cream cheese is simply cream cheese to which the so-called "hot-pack" process has not been applied.

remained within reasonable limits, since if it were too high the cheese would "leak" so badly that it would not be salable as cream cheese (R. 79, 102, 125-126).

b. *The development of the hot-pack manufacturing process and the use of moisture-retaining gums resulted in a cheese product with less fat and more moisture than cream cheese has traditionally contained.*—Beginning about 1928 the modification now known as the "hot-pack process" developed, following discovery that the addition to cream cheese curd of a water-retaining substance, such as locust bean gum, would prevent leakage, and that liquefying the curd by heating it and putting the liquid containing the gum through a homogenizer, would produce a smooth homogenous product (R. 16, 44-45, 70, 73, 113-115, 851-854). There is nothing wrong with either the hot-pack process or the use of moisture-retaining gums, as the Administrator recognizes by allowing their continuance, so long as they serve only the legitimate functions of making a better-keeping product and preventing leakage of the normal moisture content (R. 16, 39-41). As both were originally used they served only these functions.

An industry witness testified that when he first became acquainted with cream cheese made by the hot-pack process in 1928, it ran 37 to 40 percent of fat and 50 to 53 percent of moisture (R.

274). The best quality hot-pack product made by the Kraft Company today averages 32 to 36 percent of fat and 51 to 54 percent of moisture (R. 275). Witness Riggs, representing the Kraft Company, testified that "As we originally used the gum in cream cheese * * * it was a relatively high-fat, low-moisture cream cheese, and it was to prevent the seepage or leakage of water. * * * I was somewhat * * * responsible for the introduction of gum. I have sometimes regretted that, because it appears to me that the use of gum has extended to purposes for which it was not originally intended, that is, to hold excess moisture in the cheese" (R. 283).

The hot-pack process coupled with the use of moisture-retaining gums resulted in the manufacture and sale by the name "cream cheese" of a product of considerably lower fat and higher moisture content than that theretofore sold as cream cheese (R. 142, 195, 215, 242-243, 263). It ranges from about 23 to 30 percent of fat and from about 60 to 65 percent of moisture (R. 169-170, 195, 263, 271, 275-276, 429-430). It was first introduced in 1932 or 1933 (R. 215) and has been made in substantial quantities only since 1934 or 1935 (R. 235). Most of it is manufactured and distributed in a limited area—chiefly in the eastern metropolitan centers; it does not have nation-wide distribution (R. 289-290, 328). The fat content of the better grades of cream cheese has remained

constant (R. 100) or even increased through the years (R. 226). The finding (Finding 20; R. 1151) that most of the cream cheese marketed today contains from 35 to 40 percent or more of fat and from 55 to 50 percent or less of moisture is supported by two surveys conducted by the Food and Drug Administration of both cold-pack and hot-pack cheese, and by the testimony of industry witnesses including those representing petitioners. The first survey (Gov. Ex. 2; R. 367) made in 1938, included thirteen states. Thirty-three plant manufacturing cream cheese were visited (R. 14). These plants manufacture a considerable portion of all the cream cheese manufactured in the United States, and the methods used by them are representative of those used all over the country (R. 14). The second survey (Gov. Ex. 4; R. 1013) covered six representative cities, and was made with the purpose of securing information concerning the fat and moisture content of "all of the different brands of cream cheese * * * with as complete coverage as possible" (R. 840-841).

These surveys furnished a substantial basis for the determination by the Administrator as to the composition of cream cheese on the market today. Government Exhibit 2 (R. 367) shows that out of 43 samples of cold-pack cheese secured from the 33 plants visited in 13 states, 31 had not less than 35 percent of fat and 36 not less than 33 percent; and that 26 had not more than 55 percent of mois-

ture, with 7 of the remaining 17 exceeding 55 percent by but a fraction of one percent. It shows that out of 12 samples where the process of manufacture was unknown 8 had not less than 35 percent of fat and 8 not more than 55 percent of moisture. It shows that all cheese, both cold-pack and hot-pack, secured from Wisconsin, a leading cheese-producing state, contained less than 55 percent of moisture, and that all of such cheese contained more than 35 percent of fat excepting one sample that contained 34.66 percent.

Government Exhibit 4 classifies the cheese analyzed as package or bulk, the package usually being cold-pack and the bulk usually hot-pack (R. 43, 54). With respect to package cheese it shows that in Chicago, out of 57 samples purchased only 8 contained less than 35 percent of fat and only 10 more than 55 percent of moisture, and that of the latter 10 four exceeded 55 percent of moisture by less than one percent; that in San Francisco, out of 38 samples only 3 contained less than 35 percent of fat and only 2 less than 33 percent, whereas only 8 contained more than 55 percent of moisture and of these 8 five exceeded 55 percent by less than one percent; that in St. Louis, out of 25 samples 8 contained less than 35 percent of fat and 11 more than 55 percent of moisture, but of the latter 11 four exceeded 55 percent by less than one percent; that in Philadelphia, out of 24 samples only 7 contained less than 35 percent of fat and only 5

less than 33 percent, and only 5 more than 55 percent of moisture; and that in New York, out of 19 samples 4 contained not less than 35 percent of fat and 13 not less than 32 percent, and 13 not over 55 percent of moisture. Practically all of the industry witnesses testified that they make a high-fat, low-moisture product approximating the limits fixed by the Administrator (R. 176, 194-195, 224-225, 274, 301, 303-304, 316, 344-345). In addition to a low-fat cream cheese, petitioner Zausner makes a traditionally high-fat, low moisture cream cheese running 37 to 40 percent of fat and 50 to 55 percent of moisture, which accounts for half his total cream cheese volume (R. 345); similarly, petitioner Conestoga Cream & Cheese Mfg. Corporation makes a product running in excess of 34 percent of fat which accounts for 20 to 25 percent of its total sales (R. 176), and petitioner Newark Cheese Company makes one running 33 to 35 percent of fat and 56 to 58 percent of moisture which accounts for around 20 percent of its total sales (R. 316). Prior to its adoption of the hot-pack process about 1933, the cheese manufactured by petitioner Columbia Cheese Company ran 35 to 36 percent in fat (R. 338).

The reason for reducing fat and increasing moisture while retaining the name "cream cheese" is economic—"to increase the yield for competitive reasons" (R. 228-229). Petitioners' own witnesses conceded at the original hearing that the

only basis of their objection to the then proposed standard of 34 percent fat—55 percent moisture was that “economically it is impossible for us to merchandise this higher standard product in competition with the highly advertised brands” (R. 333, 141-142, 170)—a conclusion disputed by other testimony (R. 207, 213, 229) and by the experience of petitioner Zausner in making a 37 to 40 percent fat—50 to 55 percent moisture product that accounts for half his total volume (R. 344-345). A representative of petitioner East Smithfield Farms conceded that the increase in sales of the low-fat, high-moisture product, on which petitioners laid so much stress at the hearing (R. 141, 329), would not have occurred if the product had been sold by a name more descriptive of its fat content, such as “milk cheese” (R. 150).

c. Consumer confusion and prejudice from sale of the low-fat, high-moisture product as “cream cheese.”—Among manufacturers and distributors the lower-fat product is distinguished from the higher by such designations as “second grade,” “No. 2,” “low test,” “cheap,” “substitute,” etc. (R. 195, 200, 203, 216, 241, 271, 280, 374). But nothing on brands or labels indicates fat or moisture content (R. 160). Differences in manufacturing processes and differentiating terms used orally by manufacturers among themselves or in sales to jobbers are unknown to consumers (R. 14, 70). The cold-pack, high-test product is customarily sold

in small packages and the low-fat hot-pack cheese more often in bulk or in boxes, although there is no reason why both cannot be sold in either bulk or package form (R. 43-44, 54). Much of the hot-pack product in "loaf" form is sold by retailers after removal from the wrapping foil (R. 157), and there is testimony to a practice by some retailers of substituting low-fat high-moisture cheese in boxes carrying well-known labels of high-fat products (R. 196, 219-228). Price is therefore not sufficiently informative to the consumer as to fat or moisture content (R. 808-809), since there is no uniform differentiation in retail prices based on fat content. The ordinary consumer has no means of distinguishing the low-fat cheese made by the hot-pack process from a product with the traditional fat content of cream cheese (R. 152; Gov. Ex. 4). Only by experience as to taste, smell, feel, and appearance, and by putting these different types of cheese side by side, can the range of fat and moisture content be detected (R. 42, 45-47, 71, 76-77, 101, 154, 186, 188, 227, 687, 690). The use of moisture-retaining gum makes a low-fat, high-moisture cheese appear drier than it is (R. 42, 117), and the combination of heating and homogenizing with the addition of gum in the hot-pack process enables a low-fat, high-moisture cheese to simulate the "smoother body" usually associated with high-fat

content (R. 126) and "this smoothness has sometimes been mistaken for richness" (R. 227). Consumers buy cream cheese not only for its flavor but also for its nutritive properties (R. 363); and consumer belief that cream cheese is a high-fat product arises not only from the use of the word "cream" in the name itself, but from general understanding and the information made available through agricultural and consumer publications and official government bulletins (R. 83, 288, 349-350, 351-352, 363-364). The average consumer buys low-fat, high-moisture cheese "with the thought that she is getting high standard cream cheese" (R. 288).

4. *Additional evidence set forth in Argument.*—The evidence in support of the Administrator's choice of the name "neufchatel cheese" for the lower-fat higher-moisture product, and in support of the specific fat and moisture limits by which he differentiated "cream cheese" from "neufchatel cheese," is set forth *infra*, in the Argument, at pages 26-29; and the evidence in support of the pasteurization requirement of the cottage cheese standard (Regulation 19.525) is set forth *infra* in the Argument, at pages 34-35.

ARGUMENT

I

Petitioners contend (Pet. 17-20) that the failure of the cream cheese standard to include the

low-fat, high-moisture products sold by them as cream cheese (see *supra*, p. 12) renders the standard unreasonable.⁹

The authority of the Administrator under Section 401 of the Federal Food, Drug, and Cosmetic Act of 1938 (*supra*, p. 3) is not, as petitioners assume, limited to gathering information as to the composition of foods and incorporating all such information in standards for their identity. His function is to establish standards that by their very nature exclude some products or exclude or limit some ingredients. If there were not a distinction between all that has been sold under a name of a particular food, and a legal "definition and standard of identity" for that food, the purpose of Section 401 could not be accomplished. Its effect then would be to perpetu-

⁹ Petitioners urge (Pet. 15-16) that the unreasonableness of the cream cheese standard is shown by the fact that it differs substantially from the cream cheese standard adopted by the Department of Agriculture in 1921 pursuant to the Pure Food and Drugs Act of 1906. As we have shown above, footnote 7, p. 10, the earlier standard was only advisory, and it was based on the manufacturing techniques prevalent in 1921. Since that time the development of the hot-pack manufacturing process and the use of gums in cheese manufacture have necessitated the development of more rigid standards for the protection of the public. Moreover, the fundamental soundness of the earlier standard is open to serious question in that a product containing 90 percent moisture might have been sold as cream cheese (see *supra*, p. 10). In any event, the Administrator is not required under the 1938 Act merely to ratify previously existing advisory standards.

ate rather than to curb the trends toward economic adulteration that brought it forth.¹⁰ The public interest in the establishment of "standards of identity of a food, sold under a common or usual name, so as to give to consumers who purchase it under that name assurance that they will get what they may reasonably expect to receive," was expressly recognized and given effect by this Court in *Federal Security Adm'r v. Quaker Oats Co.*, 318 U. S. 218, 228-232.

The 33 percent fat and 55 percent moisture limits of the cream cheese standard are fully sustained by the evidence and represent a reasonable exercise of the Administrator's judgment. Those limits clearly could not properly have been established by "picking out the lowest" percentage figure of fat or highest of moisture at which anyone may have made a product sold as cream cheese (R. 35-36), because "the trend has been

¹⁰ The cream cheese standard does for cream cheese what the Butter Standard Act of 1923 (21 U. S. C. 321a) did for butter. Prior to that Act various products with relatively low fat content were sold as butter. The Act established a standard for butter and thereby prohibited the sale of the low-fat product as butter. See S. Rep. No. 493, 73d Cong., 2d sess., p. 10. See also *Federal Security Adm'r v. Quaker Oats Co.*, 318 U. S. 218, 232-233. The operation of the Act, it will be noted, precluded those low-fat products purporting to be butter from using that name, just as the cream cheese standard precludes low-fat cheese purporting to be cream cheese from being identified as cream cheese.

to put more moisture and less fat in the hot pack product * * * and * * * has gone further than it would be in the interest of the consumer to perpetuate" (R. 51). The basis of the choice of a 33 percent fat minimum and 55 percent moisture maximum is found in the testimony of government witnesses (R. 24-27, 33-37, 77-78, 82, 176, 183, 219, 576-577), of industry witnesses (R. 198-199, 220-221, 225, 226-229, 264-267, 276-277, 283-284, 345, 686-689, 700, 790-792); and of consumer witnesses (R. 349-350, 351-354, 363-364). Within these limits there is no opportunity for abuse of moisture-retaining gums (R. 283-285), as they do not then conceal excessive moisture. These limits require no new method of manufacture or anything new in the usual procedure, but only the use of ingredients that will produce the minimum fat content and a sufficiently controlled draining to limit the moisture content (R. 27, 52, 82-85, 87, 118-121, 123, 131, 220, 224). Hot-pack as well as cold-pack cream cheese is now being made by the methods and within the fat and moisture limits prescribed by the standard and can continue to be so made (R. 198-199, 226, 264, 265-267, 686-687, 790). The hot-pack product so made is a very satisfactory cream cheese (R. 199, 276, 283) and has consumer recognition and acceptance (R. 687, 758, 791). Petitioners' witnesses in effect conceded this at the original hearing (R. 152,

183, 333), their reason for opposing the standard being economic (R. 141-142, 170, 333).¹¹

Since the evidence shows that the present practice has resulted in consumer confusion and misunderstanding (Statement, *supra*, pp. 16-18), the case falls clearly within the principles already recognized by the courts in dealing with the Food, Drug, and Cosmetic Act as well as other regulatory statutes (*Federal Security Adm'r v. Quaker Oats Co.*, 318 U. S. 218; *Houston v. St. Louis Packing Co.*, 249 U. S. 479; *Federal Trade Commission v. Algoma Lumber Co.*, 291 U. S. 67; *Pacific States Box & Basket Co. v. White*, 296

¹¹ Petitioners argue (Pet. 18-19) that there is no substantial evidence to support Finding 20 that most of the product marketed today as cream cheese contains from 35 to 40 percent or more of fat and from 55 to 50 percent or less of moisture. We have set forth in the Statement (*supra*, pp. 12-15) the evidence in support of this finding. The Administrator did not find, as petitioners' discussion of Government Exhibits 2 and 4 would indicate (Pet. 18), that most hot-pack cheese contains not less than 35 percent of fat and not more than 55 percent of moisture, for Finding 26 expressly recognizes that most of the hot-pack cheese marketed today varies from about 23 to 30 percent of fat and from about 60 to 65 percent of moisture. Finding 26 does not conflict with the conclusion drawn by the Administrator that most of the cream cheese marketed today falls within the 35 to 40 percent fat range and the 50 to 55 percent moisture range. The traditionally high-fat, low-moisture product still constitutes substantially more than half of all that is sold as cream cheese (R. 226), and it was petitioners' own contention at the hearing that the low-fat, high-moisture product constitutes somewhere between one-fourth and one-third of the total volume of cream cheese produced (R. 35, 100, 146, 343-344).

U. S. 176, 181). The regulations being reasonable and within the statutory authority, it is immaterial that a particular manufacturer may be required to change his product or even that some products must be abandoned. (Cf. *Mugler v. Kansas*, 123 U. S. 623, 628-633; *Powell v. Pennsylvania*, 127 U. S. 678, 683-684; *Hebe Co. v. Shaw*, 248 U. S. 297, 302-303; *United States v. Carolene Products Co.*, 304 U. S. 144, 151).

II

Petitioners contend (Pet. 20-21) that Finding 23 is inconsistent with Finding 21 in that it does not make allowance for a 2 percent moisture variation that Finding 21 recognizes to exist. Finding 21 recognizes that in good commercial practice the percentages of fat and moisture in the finished cream cheese vary as much as 2 percent above or below the percentages that the manufacturer desires to obtain. Finding 23 states that, with full consideration for the variations in fat and moisture referred to in Finding 21, a reasonable fat minimum is 33 percent and a reasonable moisture maximum is 55 percent.

There is no inconsistency between these findings. The establishment of a 55 percent moisture ceiling nowise restricts the operation of a 2 percent variance; instead, it merely requires that the manufacturer must recognize and make allowance for the 2 percent variance in the making of

a finished product which may not contain more than 55 percent moisture if it is to be marketed as cream cheese.¹²

In Finding 22 the Administrator recognizes that just as soon as the fat content drops below 33 percent or the moisture content exceeds 55 percent, the product begins to take on the characteristics of something other than cream cheese (R. 1151).¹³ This being true, it necessarily follows that the limits established are the outer limits and that any product not within them, because of an uncontrollable variance or for any other reason, may not properly be identified as cream cheese. And in adopting these limits the Administrator made it clear by Finding 23 that he did so with full recognition of the 2 percent

¹² Although the Administrator found that most of the cream cheese marketed today contains from 35 to 40 percent or more of fat (Finding 20, R. 1151), he was able to lower the limit 2 percent for the variance, for he found that the product would remain cream cheese if it had a 33 percent fat content (Finding 22, R. 1151). In respect of the moisture content he found that most cream cheeses on the market have from 55 to 50 percent or less of moisture (Finding 20, R. 1151) and that a product with more than 55 percent moisture began to be something other than cream cheese (Finding 22, R. 1151). This being so, it was impossible to raise the permissible moisture content to 57 percent and still identify the product as cream cheese.

¹³ By letter of October 22, 1943, the Administrator assured counsel for petitioners that as soon as administratively feasible he would reopen the proceedings to permit petitioners to introduce further evidence regarding the maximum moisture limit of cream cheese.

variance noted in Finding 21. In these circumstances it is plain that Findings 21, 22, and 23 are wholly consistent with each other and, supported as they are by substantial evidence, furnish a reasonable basis for the regulation.

Petitioners' suggestion that there is no justification for basing a standard for hot-pack cream cheese upon the characteristics of cold-pack cream cheese (Pet. 21) fails to recognize the abundant evidence, *supra*, pp. 11-15, that hot-pack and cold-pack cream cheese of the same fat and moisture content are not different products and that hot-pack cream cheese is being made by the methods and within the fat and moisture limits prescribed by the standard. This being so, the Administrator could reasonably have concluded that one standard was fair and adequate for all cream cheese regardless of the process of manufacture.

III

Petitioners contend (Pet. 15-17) that the name "neufchatel" does not identify the product excluded from the cream cheese standard "under its common or usual name" within the meaning of Section 401 of the Act. There is, we submit, no merit in this contention. The assignment of the name "neufchatel cheese" to the low-fat, high-moisture product is supported by substantial evidence and is reasonable and within the authority of the Administrator.

Because of the traditional fat and moisture content of neufchatel¹⁴ cheese, that name was a natural and almost automatic choice for the low-fat, high-moisture product properly excluded from the cream cheese standard.¹⁵ In its composition neufchatel cheese has varied from about 20 to 29 percent of fat and from about 55 to 65 percent of moisture (R. 99, 453, 578-579, 785, 794-802). For many years prior to about 1924 it was widely sold in the United States and was well known to consumers (R. 184, 237-238, 690-692). But competitive conditions in the cheese industry resulted in a progressive cheapening of neufchatel cheese, by lowering its fat content, until consumer demand for it practically disappeared (R. 184-185, 215, 235, 237-238, 419, 578-579, 691-692); and in recent years the name "neufchatel" has virtually disappeared from the market. A government witness testified that "The

¹⁴ Neufchatel is also the name of the manufacturing process by which such cheese, as well as cream cheese, is produced (*supra*, p. 8).

¹⁵ A government witness testified, in reference to the proposal on which the hearing was held, that "that name was picked because of past history," that it "had been the name of the cheese which was next down in the fat scale from cream cheese," and that "it is a name which so far as the industry is concerned, that most nearly approaches the cheese in that fat range, and of that general character, of a soft cheese made within the provisions of this proposal" (R. 859); and an industry witness stated that "it would appear perfectly reasonable, in the light of history, to call the lower-fat product neufchatel" (R. 693).

same thing happened to neufchatel cheese right then as is being brought about right now in cream cheese" (R. 579), and an industry witness testified to the same effect (R. 237-238). The record clearly shows that the name is still well known in the trade¹⁶ and, as one industry witness showed, it has repeatedly been included in agricultural publications and textbooks on cheese manufactured as late as 1936 (R. 794, 796-797, 799-801).¹⁷

No more consumer education to the name "neufchatel" is required than to any other name than "cream cheese" that might be adopted (R. 870); and a distinctive name for a perfectly wholesome product is less likely to cause consumer confusion, misunderstanding, or suspicion than to call it "No. 2," or "Grade B," or "substandard."¹⁸

¹⁶ Cheese known by the name "neufchatel" is still made in California (R. 419) from 3.6 percent milk (R. 811-812). It has been sold commercially in Washington, D. C., within the past ten years (R. 99). Petitioner East Smithfield Farms made neufchatel cheese under that name as late as 1932 or 1933 (R. 409). Petitioner Conestoga Cream & Cheese Manufacturing Corporation formerly made it (R. 184).

¹⁷ In fact, it is presently rationed by the Office of Price Administration. See Table 10, Official Table of Consumer Point Values for Meats, Fats, Fish and Dairy Products (9 Fed. Reg. 105).

¹⁸ In respect of petitioners' suggestion (Pet. 16-17) that the Administrator might have used qualifying words in connection with cream cheese to distinguish between the high-fat and the low-fat product, it should be noted that among people in the industry the cheese in question had come to be known as "second grade," "No. 2," "low test," "cheap," "sub-

Consumers who desire the low-fat product for the very reasons, such as less caloric content, that justify the denial to it of the name "cream cheese," are the better enabled by the distinctive

stitute" (R. 195, 200, 203, 216, 241, 271, 280, 374). And one industry witness suggested that the proposed standard should call this cheese "substitute cream cheese" or "substandard cream cheese" (R. 271; see R. 280). It is difficult to believe that petitioners would have preferred any of these names to "neufchatel." Moreover, one industry witness testified that in his opinion requiring "two different names" for the high- and low-fat products is "in the interest of honesty and fair dealing" (R. 810-811); another that he "would not approve of two different standards for cream cheese, one to contain a lower percent of fat than the other," for the reason that it "would be confusing and there would be too much possibility of substitution, which would not promote fair dealing in the interest of the consumer" (R. 302); and a third that the low-fat cheese is different in identity from cream cheese as the average consumer understands it (R. 200) and that "we consider this No. 2 an inferior cheese. We feel it is a cheese which should not be sold as a cream cheese, and we feel it is a fraud to try to put cream cheese like that over on the public as cream cheese" (R. 202-203). The Administrator concluded that it "would not promote honesty and fair dealing in the interest of consumers to establish a definition and standard of identity for low-fat, high-moisture, soft uncured cheese made by the hot-pack process, under the name 'cream cheese' or a name which includes the words 'cream cheese'" (R. 1161). We believe it to be evident from the record that this conclusion is amply sustained. Compare *Houston v. St. Louis Packing Co.*, *supra*, in which this Court held that under the Meat Inspection Act of June 30, 1906 (34 Stat. 669, 676, 678), the Secretary of Agriculture was justified in prohibiting the sale as sausage of a product containing more than 2 percent of cereal or 3 percent of water or ice despite the fact that prior to the regulation excess quantities of cereal and water were used by sausage manufacturers in the product they sold as "sausage."

name of "neufchatel" to know what they are purchasing and to get what they may reasonably expect to receive by that name (R. 349-350), the same as are purchasers who expect from the name "cream cheese" to receive the traditionally higher-fat, lower-moisture product. The two standards thus promote honesty and fair dealing in the interest of consumers in that they "definitely differentiate between what have grown up to be two types of cheese, which at the present time are both sold as cream cheese, and * * * permit the purchaser who desire[s] to buy the high-fat type, to buy it under the name of cream cheese, and to buy the low-fat type under the name of neufchatel cheese, whereas at the present time just by calling for cream cheese, you cannot tell what you will get" (R. 869).¹⁹

¹⁹ Actually, a sizable proportion of the product sold in recent years as "cream cheese" is in fact neufchatel. An industry witness testified that "from the very first commercial manufacturing of neufchatel and cream cheese in this county, there has been a distinct differentiation of the two cheeses on the fat content," and that although competition since 1930 has resulted in a low-fat product being referred to on the market as "cream cheese," "this product is really a neufchatel cheese and should be sold under that name" (R. 801-802). This is corroborated by other witnesses (R. 71, 133, 257, 578-579, 594-595, 693). A government witness testified that it is not "anywhere near as misleading to call a product [neufchatel] that is exactly neufchatel, or has the composition of neufchatel, as much as it is to call a product cream cheese that has 10 percent less fat than cream cheese has had, or does have, or had in the days when neufchatel was being marketed under that name" (R. 580).

The situation in this case is strikingly similar to that considered by this Court in *Federal Security Adm'r v. Quaker Oats Co.*, 318 U. S. 218. There, as here, the Administrator established standards for two closely related products. Prior to the standards for farina and enriched farina, the kinds and quantities of enriching ingredients in enriched farina varied widely. In promulgating standards of identity for farina and enriched farina, the Administrator sought to insure that consumers who purchase either product will get what they may reasonably expect to receive. He concluded on the basis of substantial evidence that it would promote honesty and fair dealing in the interest of the consumer and would avoid consumer confusion, to require that enriched farina contain minimum quantities of specified vitamins and minerals. Similarly, prior to the standards for neufchatel cheese and cream cheese, the fat and moisture content of cream cheese varied widely. In promulgating standards of identity for neufchatel cheese and cream cheese, the Administrator likewise sought to insure that consumers who purchase either product will get what they may reasonably expect to receive. He concluded on the basis of substantial evidence that it would promote honesty and fair dealing in the interest of the consumer and would avoid consumer confusion, to require that cream cheese contain a specified high-fat and low-moisture content.

We have shown, we submit, that the name "neufchatel" is an appropriate and reasonable designation for the low-fat cheese; and that fact is an adequate basis for its use by the Administrator. We submit that the *Quaker Oats* decision is controlling of the issue here. A name that has a rational basis and is consistent with the statutory purpose of promoting honesty and fair dealing in the interest of consumers is within the Administrator's authority to adopt. The name "neufchatel" not only meets such criteria but has been associated with, and indeed is the common and usual name of, a cheese that in fat and moisture content has always fallen within the limits specified by the Administrator in the standard for neufchatel cheese.²⁰ Its use is, therefore, supported by reason as well as the evidence and the Administrator's findings.

IV

Petitioners complain (Pet. 22-23) that they are not permitted to add water to the curd in the manufacture of cream and neufchatel cheese by the hot-pack process, although at the hearing none of them testified that they actually did so use it (see R. 432-433). The Administrator, however, based on the testimony of another witness,

²⁰ This being true, there is, of course, no necessity for a finding by the Administrator that the name "cream cheese" is impractical of application to that cheese identified by the Administrator as "neufchatel."

found that water is sometimes added to the curd for the purpose of adjustment to the percentage of fat and moisture desired in the finished product; but he further found that "the addition of skim milk, which is ordinarily used for this purpose, permits any adjustment for moisture that can be accomplished by the addition of water" (Finding 27; R. 1152).

Two principal purposes may be served by the addition of water. One is to dissolve the gum used in the hot-pack process (R. 831-832, 836-837). For this purpose petitioner Columbia Cheese Co. uses cream or skim milk (R. 432). The other purpose, as stated in the finding, is to adjust the fat percentage. Such adjustment, by whatever medium, of course is proper only if the resulting fat and moisture percentages in the finished product do not violate the limits set by the standards. There was virtually no testimony of the desirability of the use of water. One Government witness saw no objection to it under the exceptional circumstances embodied in the question which he was then answering (R. 604-605). But an industry witness testified that in his opinion a good product cannot be made using water (R. 680), and another that the introduction of further moisture at this stage of manufacture is not good commercial practice, and that his company does not do it (R. 539, 563). The

Administrator undoubtedly felt that, since skim milk, which he found is customarily used (R. 1152), serves the purpose equally well if not better and is a dairy product, there is no need, but, on the contrary, some danger in endorsing the use of water. It is well known that water is the most common economic adulterant of foods and to sanction its use, when a dairy product just as effective or more so is available, would not be consistent with a sound policy of standardization designed to maintain the integrity of cream and neufchatel cheese as dairy products. It seems plain that the Administrator's judgment in the matter is reasonable and adequately supported. He chose the better of two possible alternatives.

V

Petitioners' contention (Pet. 24-25) that Regulation 19.525, precluding the use of unpasteurized skim milk in the manufacture of cottage cheese, is unsupported by an appropriate finding and that it is, therefore, arbitrary and unreasonable, is, we submit, without merit.²¹ The Administrator found that the starting material from which soft uncured cheeses are made is pasteurized, and that pasteurization is necessary to avoid

²¹ Because of the current impossibility of getting pasteurization equipment, the Administrator has postponed the enforcement of this requirement until such equipment shall have become available.

objectionable odors and flavors contributed by the growth in raw milk of certain bacteria (Findings 8 and 9; R. 1149). Cottage cheese is a soft uncured cheese (Finding 46, R. 1155) and these findings are applicable to it (Finding 47, R. 1155).

It has been shown (*supra*, p. 9) that methods of manufacturing soft uncured cheeses are an essential factor contributing to their distinguishing characteristics of appearance, texture, flavor, smell, and taste. The method of manufacture is therefore a necessary and appropriate consideration in prescribing definitions and standards of identity. It would in fact be impossible to define a cheese without fixing the basic essentials of the manufacturing process. The only question, therefore, is whether there is substantial evidence that pasteurization of the skim milk used as the starting material for cottage cheese is an essential part of the manufacturing process. It is significant that petitioners do not object to the same requirement with respect to the starting material for cream and neufchatel cheese.

Good commercial practice requires pasteurization (R. 1000). A government witness testified that all dairies visited in an investigation by the Food and Drug Administration of present practices throughout the United States in the manufacture of cottage cheese (R. 965-969, Gov. Ex. 11) were pasteurizing the starting material (R. 977), and that pasteurization is necessary "in

order to make a uniform product with good qualities" (R. 977). It is deemed essential by a concern manufacturing over 12,000,000 pounds annually (R. 991-992, 993-995) and the representative of an association of 26 dairies producing over 10,000,000 pounds annually testified it would not be advisable to permit the use of unpasteurized skim milk (R. 682-683). The pasteurization requirement was also favored by state university authorities on cottage cheese manufacture and dairy bacteriology (R. 993-995, 997-998). Cottage cheese is highly perishable (R. 987), and pasteurization provides substantially better keeping qualities than it otherwise would have (R. 735, 987, 1000). Unless the bacteria causing the objectionable odors and flavors referred to in the Administrator's finding are eliminated by pasteurization, a uniform product with the minimum keeping qualities needed for its sale in interstate commerce cannot be assured.

The evidence supporting the findings with respect to pasteurization of the skim milk from which cottage cheese is made is plainly substantial. The reasonableness of the requirement is apparent from the evidence that it represents what is now almost universally the industry practice, and results in a better keeping product of more uniform quality and the characteristics that consumers may reasonably expect to find present. It is evident that consumer interest in such a requirement

is great, and that it will promote honesty and fair dealing toward consumers.²²

CONCLUSION

We submit that the administrator did not depart from the statutory requirements in choosing these standards of identity for the purpose of promoting fair dealing in the interest of consumers, that the standards which he selected ~~are adapted~~ to that end, and that they are adequately supported by findings and evidence. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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Attorney.

FEBRUARY 1944.

²² Although petitioners assigned as error (Pet. 14) the court's affirmance of Regulation 19.525 requiring that the moisture content of cottage cheese not exceed 80 percent, they have not argued the point. Plainly Regulation 19.525 is supported by substantial evidence and is reasonable (R. 612, 732, 965-969, 973-974, 976, 980, 981-984, 1005-1008).





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Supreme Court of the United States

October Term, 1943.

No. 614.

COLUMBIA CHEESE CO., CONESTOGA CREAM
& CHEESE MFG. CORP., EAST SMITHFIELD
FARMS INC., EDELSTEIN DAIRY CO. INC.,
NEWARK CHEESE CO. INC., ROSEDALE
DAIRY CO. INC., SODUS CREAMERY CORPO-
RATION, and MEYER ZAUSNER,

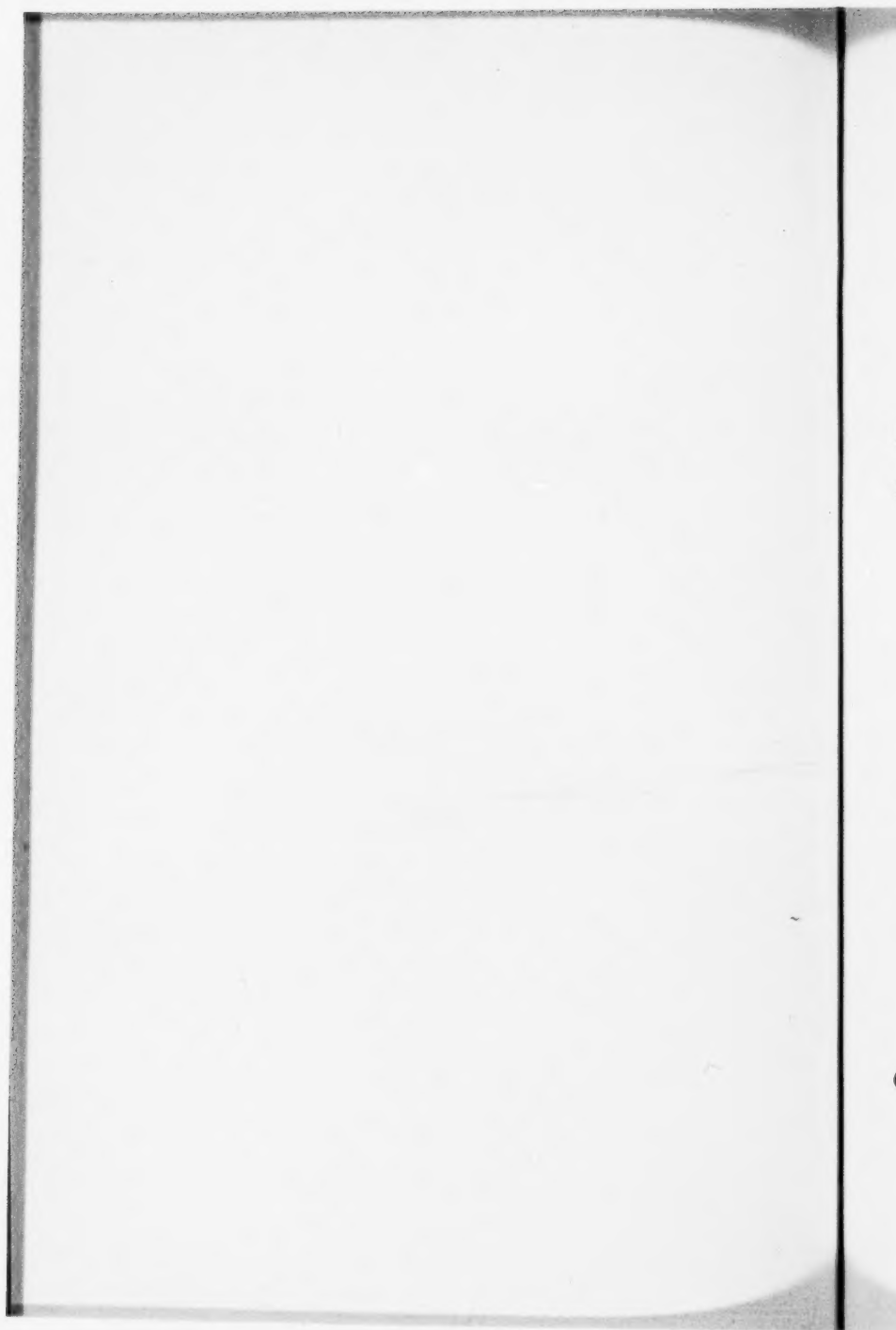
Petitioners,

vs.

PAUL McNUTT, as Federal Security Administrator
of the United States.

PETITIONERS' REPLY BRIEF.

MARTIN A. FROMER,
Attorney for Petitioners.



CONTENTS

	PAGE
REPLY AS TO THE CASES	1
REPLY AS TO THE FACTS	4
1. The Dissenting Opinion	4
2. Inconsistent With Existing Standards	4
3. Hot-pack Process Did Not Cause Low Fat Cheese	5
4. Most Cream Cheese Does Not Comply	6
5. Petitioners Are Majority of Industry	7
6. Meaning of "High-fat, Low-moisture" etc.	8
7. Standard Above Highest Grade	10
8. Hot-pack Cream Cheese Cannot Be Made Within the Standard	10
9. Reference to "Industry Witness"	11
10. Choice of Name "Neufchatel"	11
11. Use of Water for Purposes of Adjustment	13
CONCLUSION	14

CITATIONS OF AUTHORITIES

	PAGE
Federal Security Adm'r v. Quaker Oats Co., 318 U. S. 218	2, 3
Federal Trade Commission v. Algoma Lumber Co., 291 U. S. 67	2, 3
Hebe v. Shaw, 248 U. S. 297	2
Houston v. St. Louis Packing Co., 249 U. S. 479 ...	2, 3
Mugler v. Kansas, 123 U. S. 623	2
Pacific States Box and Basket Co. v. White, 296 U. S. 176	2
Powell v. Pennsylvania, 127 U. S. 678	2
United States v. Carolene Products Co., 304 U. S. 144	2

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CORP., EAST SMITHFIELD FARMS INC., EDELSTEIN DAIRY
CO. INC., NEWARK CHEESE CO. INC., ROSEDALE DAIRY
CO. INC., SODUS CREAMERY CORPORATION, and MEYER
ZAUSNER,

Petitioners,

vs.

PAUL McNUTT, as Federal Security Administrator of
the United States.

PETITIONERS' REPLY BRIEF.

The Administrator's answering brief argues evidentiary detail but avoids the questions of law to be determined. The petitioners are not permitted to indulge in such an analysis of the evidence upon this application for a writ of certiorari (Rule 38 of this Court, and cases there cited), but some of the statements made are too inaccurate or misleading to go unchallenged. First, petitioners will refer to the cases cited by the Administrator.

A. Cases.

The Administrator's citation of cases (Adm'r. Br. 22-23) starts with the assumptions "that the present prac-

tice has resulted in consumer confusion" as to which there is no finding by the Administrator, and that the regulations are "reasonable and within the statutory authority" which is the very issue in the case.

The cases cited fall into two classes. In the first class are *Mugler v. Kansas*, 123 U. S. 623; *Powell v. Pennsylvania*, 127 U. S. 678; *Hebe v. Shaw*, 248 U. S. 297; *United States v. Carolene Products Co.*, 304 U. S. 144; and *Pacific States Box & Basket Co. v. White*, 296 U. S. 176. All of these cases deal with an issue not in the least involved herein, viz., the question of legislative power, federal or State, under the Constitution. Nowhere in the petition is the question of Constitutional power raised.

The only point of similarity between these cases and the instant case is that in all of them a theretofore legitimate trade was either destroyed or regulated with resulting hardship and economic loss. But petitioners do not contend that Congress cannot validly enact legislation which will affect them adversely or even destroy their business. For the purpose of this case, it may be conceded that Congress could legally abolish all interstate commerce in cream cheese. That, however, in no way proves that in enacting the Federal Food, Drug and Cosmetic Act of 1938, Congress *intended* to impose unreasonable hardship on honest industrial enterprise, on the contrary, the statements of the President and the Congressmen responsible for the drafting of the Act clearly establish that such was not the legislative intent (Pet. 19-20).

In the second class of cases are *Federal Security Administrator v. Quaker Oats Co.*, 318 U. S. 218; *Houston v. St. Louis Packing Co.*, 249 U. S. 479; and *Federal Trade Commission v. Algoma Lumber Co.*, 291 U. S. 67. The underlying, ever-present motif in all these cases is the recalcitrant manufacturer or merchant; the one or two or three producers who refuse to abide by a standard under

which the respectable or majority members of the industry do business. The cases all involve deviations from the norm. In other words, they deal with that "chiseling minority" (or, at least with that minority) against which Congress intended to legislate. In none of the cases is issue taken, as it is here, with an entire reputable industry, save a minority of one firm.

In *Federal Trade Commission v. Algoma Lumber Co.*, *supra*, some new producers attempted to adopt an existing well established name for a different product, with the purpose of "palming off". This is quite different from the instant case where every member of the industry markets the product in question under one name and one name only.

The *Quaker Oats* case has been heretofore distinguished (Pet. 7, 8, 15). Nothing in the Administrator's brief compels the conclusion that the decision sustaining the Administrator's power to exclude extraneous vitamins from farina to prevent consumer confusion is decisive on the question of his power to deprive an industry of the basic name of cream cheese and foist on its product the name "neufchatel".

In *Houston v. St. Louis Packing Co.*, *supra*, the petitioner was a single producer who alone objected to the standard imposed by the Secretary of Agriculture. In that case there was no issue with regard to the proper name and identification of the product in question. The product was found to be adulterated and it was a violation of the regulation to introduce it into interstate commerce under any name. In the instant case the product is not barred from the market but is denied its common and usual name or anything which resembles that name.

B. Facts.**1.**

The Administrator in referring to the decision in the court below, states that one judge dissented "in part" (Adm'r. Br. 6). The fact is that the dissent in the court below embraces all of the standards which are here in issue.

2.

The Administrator states in his brief (p. 10) that although the standard of identity for cream cheese fixed under the Pure Food and Drugs Act of 1906 (37 Stat. 768) provided that it should contain "in the water-free substance, not less than sixty-five percent (65%) of milk fat," nevertheless, "it theoretically recognized as cream cheese a product containing 90 percent of moisture and 6.5 percent milk-fat, since in such a case the 6.5 percent milk-fat content would constitute 65 percent of the water-free substance." The Administrator is forced to admit however that this "theory" bears no relation to reality.

The only reason given by the Administrator for the abandonment of this 40 year old standard is that the development of the use of gum has disturbed the previous comparatively stable relationship between moisture and the finished product, by permitting the incorporation of more moisture than would be possible without its use (Finding 38, R. 1154). The only "X" quality in the 40 year old standard is the percentage of moisture in the finished product. When that is fixed the percentage of fat becomes certain, *i. e.*, 65 percent of the remaining substance. Having determined the "X" quality by fixing an absolute maximum for moisture at 55 percent, whatever alleged deficiency arose in the established standard as the result of the development of gum was obviated. Thus,

after fixing the maximum moisture at 55 percent, an exact definition, without variables, would have been achieved merely by adding the clause, "and contains no more than 55 percent moisture in the finished product" to the 1921 standard. Such definition would fix a minimum of 29.2 percent fat in the finished product (65 percent of the 45 percent water-free substance) (fol. 2246).

It is respectfully submitted that if the Administrator is to find that 55 percent moisture is reasonable then he must also find, under existing standards, that 29.2 percent butterfat is reasonable.

3.

The Administrator states in his brief (pp. 11, 12) that the development of the hot pack process resulted in a cheese product with less fat and more moisture than previously existed, implying that before about 1928 cream cheese generally contained a minimum of 33 percent fat and a maximum of 55 percent moisture. All of the evidence in the record on the subject, however, is to the effect that long before the discovery of the hot pack process, and for many years, practically all manufacturers produced cream cheese of less than 33 percent fat and more than 55 percent moisture. Mr. Taub testified (fols. 1765-1768) that in 1918 there was on the market cold pack cream cheese of less fat and more moisture. Mr. Zausner pointed out that as far back as his experience goes, which is 1923, the same was true. He testified (fols. 2106-2109) that in 1928, before the use of gum and the hot pack process, he manufactured a cold pack cream cheese testing 26 to 27 percent in fat, and that practically every concern manufacturing cream cheese at the time made a cold pack cream cheese of similar composition.

Even Mr. Page of Kraft, the only manufacturer who favors the standard promulgated by the Administrator,

admitted (fols. 649, 1950-1951, 1956) that as far back as 1914, cream cheese of less than 33 percent fat content was manufactured and marketed under that name.

4.

The Administrator goes to great lengths in his brief (pp. 13-15) in his attempt to sustain the finding that most cream cheese comes within the limits of the standard fixed. However, instead of doing the simple thing of adding up all of the samples collected and stating how many comply, the Administrator selects and segregates certain types and sets forth in his brief only such calculated results as would appear to serve his purpose. Thus he analyzes the cold-pack samples tabulated in Government Exhibit No. 2 and disregards the hot-pack cream cheese samples. He then analyzes the package cream cheese in Government Exhibit No. 4, which is stated as "usually being cold-pack" (Adm'r. Br. 14), and disregards the cream cheese sold in bulk. A true and accurate statement of the information contained in these government exhibits would show that in Government Exhibit No. 2 (R. 367-371) 96 samples of cream cheese were collected, of which 59, or more than half, do not comply with the standard. It would further show that in Government Exhibit No. 4 (R. 1013-1025), 395 samples of cream cheese were collected, of which 227, or more than half, do not comply.

It is clear that most of the samples do not comply and no involved or selective analysis can change the result. It is illogical to draw a conclusion from an analysis of a particular type of cream cheese that all cream cheese is of a particular test. The record shows that most package cold-pack cream cheese is Kraft's "Philadelphia Brand" cream cheese. The result, therefore, is that the Administrator's limits, which he ascribes to the entire industry,

are largely the trade practice of a single manufacturer. Thus, of the 57 samples of package cheese referred to as having been collected in Chicago (Adm'r. Br. 14), 40 are the product of a single manufacturer, and no one will deny that they were packages of "Philadelphia Brand" cream cheese.¹

The reference to the State of Wisconsin as a leading cheese producing State (Adm'r. Br. 14) is misleading. A negligible amount of cream cheese is produced in Wisconsin and the samples of cream cheese collected in that State were all of a single manufacturer, and even the respondent's witness expressed doubt that the cheese was manufactured by the hot-pack process (fols. 2391-2394).

The respondent's attorney, in the face of the facts in the record, and the table contained in the petition (p. 26), does not contend that the industry makes a so-called "high-fat, low-moisture" product, *within* the limits fixed by the Administrator, but only "*approximating*" such limits (Adm'r. Br. 15). An examination of what is meant by the word "*approximating*" indicates that the approximation always exceeds 55 percent moisture.²

5.

The Administrator in his brief (p. 19) states that "his function is to establish standards that by their very nature exclude some products". Throughout the brief there is continual reference and implication that "some" products do not comply with the Administrator's stand-

(1) - This is shown by fols. 2301-2303, wherein it is stated that all samples having the same fat and moisture content are of the same brand, the fat and moisture content given being the average of the first two samples tested of each brand where more than two samples of the same brand were purchased. Thus, in Chicago the 40 samples having a fat content of 37.41 and a moisture content of 52.86 are of the same brand and represent the average of only 2 of the 40 samples.

(2) - The petitioner Zausner testified that his highest quality cheese tests 57% moisture (fol. 2105).